IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 12

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely,

Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR RE-HEARING

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Petitioner respectfully requests a re-hearing in the within matter for the following reasons:

I. THE PETITIONER OBVIOUSLY FAILED TO MAKE CLEAR TO THIS COURT THAT SHE WAS PRESERVING THE ISSUE OF THE SUFFICIENCY OF THE EVIDENCE.

In her Petition for Writ of Certiorari, Sandra Lee Neely stated:

> The petitioner does not concede for one moment that the trial court and the jury were wrong and that the appellate court was right in interpreting the evidence as to proximate cause and negligence.

The Supreme Court, in granting the writ, included in its Order Allowing Certiorari ". . . all questions presented by the petition".

In the belief that the Court was thus recognizing the issue of the sufficiency of the evidence as a point to be raised, the petitioner vigorously argued as the very first point in her brief on the merits that negligence and proximate cause were jury issues under the facts of this case. Again, the petitioner included this point as the very first paragraph of the "Conclusion" of her reply brief on the merits.

The petitioner made every attempt to preserve this issue which is so important to her and respectfully requests that this Court consider the issue of the sufficiency of the evidence as to proximate cause and negligence.

Your petitioner, without rehashing the evidence of the case, respectfully adopts that portion of the dissenting opinion of Mr. Justice Black which so succinctly develops this point.

II. THE COURT MISCONSTRUED THE IMPORT OF THE HENAGAN CASE.

This Court, in its Opinion, said:

> And in *New York, New Haven & Hartford R.R. v. Henagan*, 364 U. S. 441, this Court itself directed entry of judgment for a verdict loser whose proper request for judgment *n.o.v.* had been wrongly denied by the District Court and by the Court of Appeals.

However, when we examine the transcript of the record and the briefs in the *Henagan* case, we find that there was not the slightest doubt in the mind of the trial judge in that case that the evidence was insufficient to sustain a jury verdict. The only misapprehension of the trial court

was as to its own power to direct a verdict or to grant judgment n.o.v. The Supreme Court, in effect, held that the trial judge was right about the evidence, but wrong about his own limitation of power. All that the United States Supreme Court did was to enter the dismissal which the trial judge was willing, but felt that he was unable to order.

III. THE PETITIONER AS THE VERDICT WINNER NOW FINDS HERSELF IN A NOVEL POSITION UNLIKE THAT OF ANY LITIGANT EVER TO APPEAR BEFORE THIS COURT.

The Supreme Court, for the first time, has interpreted the Federal Rules of Civil Procedure as requiring a verdict-winner as appellee to assign grounds for a new trial in the event the appellate court fails to agree with the rulings of the trial court. Until now, no appellee was ever told by this Court that he must assign cross-errors. Under these circumstances, this petitioner prays that the Court revise its Opinion at least to the extent that she be permitted an opportunity to file a motion for new trial.

IV. CONCLUSION.

The petitioner prays that this Petition for Re-Hearing be granted; that the decision entered herein on March 20, 1967, be vacated; that the judgment of the court below be reversed and that the judgment of the trial court be reinstated; or, in the alternative, the petitioner prays that she be permitted an opportunity to file a motion for new trial.

The petitioner also prays for such other and further relief in the alternative as may be appropriate.

Respectfully submitted,

KENNETH N. KRIPKE
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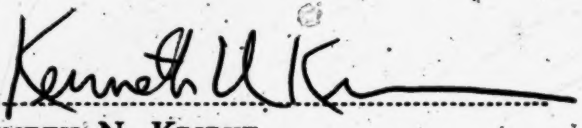
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, Kenneth N. Kripke, one of counsel for the above named petitioner, do hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not for delay.



KENNETH N. KRIPKE,
One of Attorneys for Petitioner

PROOF OF SERVICE

I, Kenneth N. Kripke, one of the attorneys for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of April, 1967, I served a copy of the foregoing Petition for Re-Hearing on John C. Mott, Anthony F. Zarlengo, and Joseph S. McCarthy, attorneys for respondent, by mailing copies in duly addressed envelopes with proper postage prepaid, to John C. Mott, Esq., 1020 American National Bank Building, Denver, Colorado 80202; Anthony F. Zarlengo, Esq., 595 Capitol Life Center, Denver, Colorado 80203; and Joseph S. McCarthy, Esq., 745 Washington Building, Washington, D.C. 20005.

KENNETH N. KRIPKE